Supreme Court of Wisconsin
Judicial Conduct Advisory Committee **OPINION 99-1**
Date Issued: January 29, 1999

í í

ISSUE

May a full-time municipal judge serve as a neutral third person[1], without pay, if appointed by a circuit court judge?

ANSWER

No.

FACTS

The requestor is a full-time municipal judge who would like to serve as a neutral third person in cases in circuit court. The requestor expects to receive an appointment to act as a neutral third person from one or more circuit court judges. The requestor will not receive any pay from any source and will not engage in these activities while being paid by the municipality.

DISCUSSION

The Committee concludes that the issues presented involve the provisions of SCR 60.01(8) and SCR 60.05(6).

SCR 60.01(8) defines a "judge" as:

> [A] justice of the supreme court, a judge of the court of appeals, a judge of the circuit court, a reserve judge, a municipal judge, a court commissioner, and anyone, whether or not a lawyer, who is an officer of the judicial system and who performs judicial functions.

SCR 60.05(6) states:

> A judge may not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

[1] The committee has previously decided to use the term "neutral third person" in place of "arbitrator or mediator." The committee believes "neutral third person" is a more accurate and contemporary term. [See Wis. Advisory Op. 98-6 (1998).]

This rule provides for an absolute prohibition against a judge's acting as an arbitrator, mediator, or otherwise performing judicial functions in a private capacity. The only exception to this absolute prohibition is the judge's action being "expressly authorized by law."

The issue in the case turns on the meaning of the word "expressly" in SCR 60.05(6). BLACK'S LAW DICTIONARY 581 (6th ed. 1990) defines "expressly" as "[i]n an express manner; in direct or unmistakable terms; explicitly; definitely; directly." The same edition defines "express" as "[c]lear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous." The Committee must apply these definitions to the facts under consideration.

To the Committee's knowledge, there is no statute *expressly* authorizing a circuit court judge to appoint a full-time municipal court judge as a third-party neutral without pay. In order to have the power to issue such an order – and overcome the prohibition of SCR 60.05(6) – a circuit court judge would require authorizing legislation. In this case, none exists.

It may be argued that WI. Stat. § 802.12(2)(c) (1997) provides such authority. This statute, like SCR 60.05, was enacted by supreme court rule. It provides:

> If the parties cannot agree on a person to provide the settlement alternative, the judge may appoint *any person* who the judge believes has the ability and skills necessary to bring the parties together in settlement (emphasis added).

This statute recites a general grant of authority permitting a judge to appoint any person to serve as a third party neutral whereas SCR 60.05(6) is a specific rule barring a judge from acting in that capacity. A fundamental rule of statutory construction holds that when comparing a general statute and a specific statute, the specific statute takes precedence. *See Milwaukee v. Kilgore,* 193 Wis.2d 168, 185, 532 N.W.2d 690, 696 (1995).

A leading commentator on judicial ethics has noted that "non-judicial problem-solving obligations that are assigned *to judges* by statute are not in conflict with the rule against arbitration." JEFFREY M. SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS §7.25 at 240 (2nd ed. 1995) (emphasis added). As an example, the commentator cites a New York statute which authorizes "three referees, each of whom shall be either a justice of the Supreme Court or a retired justice of the Supreme Court…" to resolve annexation disputes. *Id.* at n. 222. Because this language represented a legislative extension of the judicial duties previously imposed upon judges, the New York Supreme Court, Appellate Division, held that the statute did not violate a state constitutional provision barring judges from serving as third party neutrals. *See Common Council of Albany v. Town Bd.,* 272 N.Y.S.2d 307, 309 (N.Y.A.D.

1966), *aff'd.* 278 N.Y.S.2d 618 (1976). The New York statute thus constitutes an *express* authorization, because it states specifically who is to perform the obligation.

In contrast, Wis. Stat. § 802.12(2)(c) (1997), is not an *express* grant of authority *to judges*, but rather constitutes a *general* grant of such authority to serve as a neutral to "any person" appointed by the court. This statute does not state directly or explicitly that "any person" includes judges. Nor does the Committee see a supreme court intent to bring judges under the ambit of this statute, such that SCR 60.05(6) is no longer applicable. Therefore, the Committee concludes that Wis. Stat. § 802.12(2)(c), the more general statute, does not overcome the specific prohibition set out in SCR 60.05(6).

If the Committee were to conclude otherwise, then the express authority required by SCR 60.05(6) is rendered meaningless by the mere stroke of the judicial appointment pen under Wis. Stat. § 802.12(2)(c) (1997). The Committee doubts that the supreme court intended an important rule governing judicial conduct to be abrogated under such a general grant of authority. Another rule of statutory construction states that when statutes are seemingly in conflict, they should be harmonized, if it is possible, in a way which will give force to each. *See Kilgore,* 193 Wis.2d at 184, 532 N.W.2d at 695-96. The Committee's interpretation abides by this principle: the prohibition of SCR 60.05(6) remains intact as to judges while the authorization granted by Wis. Stat. § 802.12(2)(c) (1997), remains intact as to all persons except judges.

Based on these principles of statutory construction, we conclude that Wis. Stat. §802.12(2)(c) (1997) does not constitute the "express" authorization required by SCR 60.05(6). We decline to interpret the phrase "any person" in the statute to *imply* the inclusion of full-time municipal judges.

CONCLUSION

The Committee concludes that a full-time municipal judge may not act as a neutral third person without pay, if appointed by a circuit court judge, because such an appointment does not constitute the express authorization required by the Code of Judicial Conduct SCR 60.05(6).

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60--Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 99-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin, this 29th day of January, 1999.

_____

Thomas H. Barland
Chair